No. 2737.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

The Miller Rubber Company, a corporation, and the Miller Rubber Company of California, a corporation,

Appellants,

vs.

Citizens Trust & Savings Bank, a corporation, as Trustee in Bankruptcy of the Estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, Bankrupt,

Appellee.

OPENING BRIEF OF APPELLANTS.

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HISTORY OF CASE.

This is an appeal [p. 134] and a cross-appeal [p. 163] from the final order, decree and judgment of the District Court of the Southern District of California, Southern Division, on November 22nd, 1915 [p. 132], upon issues between appellants and appellee which

arose in the bankruptcy proceedings of W. D. Newerf, trading as W. D. Newerf Rubber Company [p. 60], for reclamation of personal property by appellants [p. 7 *et seq.*]. It is stipulated that the petition in bankruptcy against said W. D. Newerf was filed March 15th, 1915; that he was adjudged bankrupt April 9th, 1915, and that the amended petition herein was filed in said bankruptcy proceeding [pp. 6, 107-108].

The case is presented upon the pleadings, and such evidence as shows the errors complained of and objected to, duly allowed by order of the court [p. 158], and upon stipulation of counsel [p. 159].

The facts are as follows:

The Miller Rubber Company is an Ohio corporation, having its place of business at Akron, in the manufacture of automobile tires, accessories and other rubber goods [p. 62].

The Miller Rubber Company of California is a California corporation, organized for the purpose of acting as the agent in the handling and selling of the goods of The Miller Rubber Company [pp. 62-63].

W. D. Newerf, the bankrupt, was doing business in San Francisco, San Bernardino and Los Angeles under the name of the W. D. Newerf Rubber Company [p. 60].

On November 6th, 1911, The Miller Rubber Company entered into a contract with W. D. Newerf [p. 90] whereby it appointed W. D. Newerf its agent to handle its goods, consisting mostly of automobile tires and accessories. The Referee found, and appellee's counsel claim, that the entire controversy is circumscribed by this contract. In 1914, The Miller

Rubber Company of California was organized and a written contract was entered into between The Miller Rubber Company of California and the said W. D. Newerf [p. 95], together with a supplement thereto [p. 105] June 11, 1914.

It is specifically provided in the 1914 contract [p. 104] as follows:

"This contract and supplement shall supersede all contracts, agreements or understandings of any nature now existent between The Miller Rubber Company, or The Miller Rubber Company of California, and W. D. Newerf Rubber Company or W. D. Newerf, and such contracts, agreements and understandings shall be, and are considered null and void, except as to the unpaid accounts." [See also p. 115, 1911 contract ended.]

The personnel of the Board of Directors of The Miller Rubber Company, and The Miller Rubber Company of California, is as follows:

Jacob Pfeiffer, president of both companies;

F. B. Theiss, treasurer of both companies;

William F. Pfeiffer, secretary and general manager of both companies [p. 38].

There was only one set of books kept to show the transactions of these two corporations, to-wit: the books of The Miller Rubber Company [pp. 38, 39, 145]; the account for goods shipped to The Miller Rubber Company of California, W. D. Newerf, being upon a memorandum slip and appeared on the books of The Miller Rubber Company no more than a memorandum. The memorandum was kept simply to show where the goods were that belonged to The Miller Rubber Company [p. 39]. Money deposited to the

account of The Miller Rubber Company of California was checked out to the account of The Miller Rubber Company. All of the property that was deposited with The Miller Rubber Company of California, W. D. Newerf, agent, belonged to The Miller Rubber Company, of Akron, Ohio. The same is true as to the money also [p. 39].

The record is replete with evidence that The Miller Rubber Company of California was organized solely to act as the agent of The Miller Rubber Company, and to comply with the law of California [pp. 27, 37, 38]. This is also shown in the findings of the Special Master [pp. 62, 63].

The bankrupt, W. D. Newerf, transacted all his business with The Miller Rubber Company, including the writing of letters and telegrams, with full and definite knowledge that in so far as the two companies being separate, *it was one and the same* [pp. 27, 31, 32, 47, 51, 52, 54, 58].

The Prudential Rubber Company appears nowhere in the proceedings (while we understand it was an agent of The Miller Rubber Company), and no issue is raised in any manner or form, either in its favor or against it. The entire controversy, therefore, is between The Miller Rubber Company, The Miller Rubber Company of California and the trustee in bankruptcy of the said W. D. Newerf.

The amended petition of appellants to recover the specific property was filed March 31st, 1915 [p. 8], and the answer of the trustee duly filed [p. 14]. This being previous to the adjudication in bankruptcy, the matter was referred to the Referee as Special Master

[pp. 17, 18]. Very early in the hearing the Special Master made an order [pp. 19-24] for the delivery of certain property upon the execution of a bond, which was given; and the property shipped since the taking effect of the 1914 contract was delivered to petitioners.

EVIDENCE.

Thereupon the hearing continued as follows: W. D. Newerf, the bankrupt, testified that he had on hand goods consigned to him under the 1911 contract [p. 25]; that he understood the purpose of the organization of The Miller Rubber Company of California, but that he was dealing with The Miller Rubber Company [pp. 26, 27], and in the handling of the goods of The Miller Rubber Company under the 1914 contract he "made no change in his system of books." He "still kept" his *stock cards* "just the same." That on August 1st, 1914, he "put in a new system entirely, a shorter system, but it was carried on in the same way as it had been before. The *cards* show the casings and tubes on hand the 1st of July, 1914, and as new goods came in they were put on the cards as they came in. The invoices came from Akron, Ohio" [p. 28]. He testified there was no sign in the store [p. 29] to indicate to the public the ownership of the property. Mr. Conlee testified that there were signs there with The Miller Rubber Company's name on [p. 40]. Mr. Conlee also testified there were certain of the same goods reconsigned to various people [p. 40].

The evidence further shows that The Miller Rubber

Company of California was organized to comply with the statutes of California.

That "goods were sold during the month to customers, the amount figured at the end of the month, and a statement sent to The Miller Rubber Company for the Miller goods, and that sales were made from the consigned stock of The Miller Rubber Company" [p. 26]. That notes were given in settlement thereof [pp. 26, 34].

All goods delivered under the 1914 contract were ordered returned to The Miller Rubber Company of California [p. 87].

The Special Master interpreted the 1911 consignment contract to be a sale, and that all goods delivered thereunder vested in the trustee in bankruptcy, of the value of $7,685.23 [pp. 74, 75, 86].

Commissions.

The further controversy arose as to the interpretation of the contract of 1914 in reference to the commission which should be allowed to the bankrupt. The testimony of the bankrupt is that under the paragraph of said contract relating to commissions [p. 98] that his commission was 10-12½-12½-5% *from the list* attached to the contract. That the 5% *"terms"* on the invoices was a matter of The Miller Rubber Company's making, and an inducement for the customer to pay cash [pp. 29, 30]. The invoices read "5% 10th prox" [p. 30]. His testimony in relation to that was objected to as calling for a conclusion of the witness [pp. 30, 31] and *objection sustained.*

Mr. Charles R. Wetsel, Akron credit manager of The Miller Rubber Company, testified that the compensation of the bankrupt was to be the difference between the *actual selling price* and 10-12½-12½-5% off list price.

"Suppose you go to Newerf to buy a tire. He knows your credit is good and renders you a bill for $100.00 worth of tires, but he gives you terms of 5% 10th prox., which means that the *actual selling price* of the goods is $95.00. * * * The Miller Rubber Company * * * determine the basic price, 10-12½-12½-5% off $100.00, is a certain amount, and deducting that certain amount from this $95.00 is what he gets for his commission" [pp. 35, 36].

See letters [pp. 52, 53, 57, 58]. The letter of the bankrupt [p. 53] in relation to the manner of arriving at, and the amount of, commissions, shows he complied with the figures and conclusion of The Miller Rubber Company:

"However, we as stated in telegram are complying with your request and enclose you our note for $1000.00 and our check for $1058.16, this in accordance with our figures would be overpaying you about $1000.00."

Upon the question of commissions the Special Master found in accordance with the contention of the bankrupt by allowing commissions of the bankrupt to be the difference between the *list* price and 10-12½-12½-5% off [pp. 84, 85, 86]. By so doing he found against The Miller Rubber Company of California and ordered that it pay $4495.25 [pp. 85, 87].

Preference.

There is no evidence in the record that an issue as to any preference having been given was raised, but the Referee held that $269.98 collected by The Miller Rubber Company subsequent to November 20th, 1914, must be returned to the trustee in bankruptcy [p. 88]. Upon this point one of the attorneys for the trustee stated: "We are not trying that now" [p. 40].

Report of Audit Company.

The Special Master ordered an audit of the books to be taken [p. 21], and objections thereto were made by counsel for appellants [pp. 40, 120].

Depositions.

Notice to take depositions was duly given [pp. 108, 109], but the Special Master's report was filed July 13th, 1915, before the same could be taken [p. 90]. Thereupon, affidavits were made in reference to the depositions and the facts covered by them [pp. 110-121]; also a counter-affidavit [p. 122]; and notice of motion was also made to receive the depositions in evidence [pp. 155, 156]; but the order, decree and judgment of the court is self-explanatory that the depositions were not received in evidence [pp. 132-133].

Exceptions to Report of Special Master.

The report of the Special Master [pp. 59-90], and exceptions thereto [pp. 123-132], were filed by appellants, to which we refer for the matters and things

therein objected to, and to which exception was duly taken. Upon hearing this report, the order, decree and judgment of the District Court is self-explanatory [pp. 132-133]. Thereupon, an appeal was duly taken by The Miller Rubber Company, and The Miller Rubber Company of California, upon assignments of error [pp. 141-155].

The Law.

Assignments of error.

Brief of the argument.

I.

The said District Court erred in its finding, decision and judgment, under the evidence, and the law, that the title to said goods sought to be reclaimed was in the Trustee of said bankrupt estate and not in The Miller Rubber Company, the petitioner for reclamation. [p 141].

Contract of 1911.

It was contended by counsel for the trustee that the contract of 1911 was still in force, and that goods received under that contract belonged to the trustee in bankruptcy. Both of these questions were resolved in favor of the trustee [pp. 62, 74, 86]. In the Special Master's conclusions of law there is no statement, however, that the contract of 1911 is still in force. One of the affidavits in reference to the depositions, proof of claim, etc., contains the facts in reference to the termination of the 1911 contract, and the arrangement for sale of the property under said contract [p. 115]. This is not controverted.

The appellants' contention is that the contract of 1911 was wholly superseded by the contract of 1914 [p. 104]. However, we present herewith the questions which arose upon the issues as to whether the contract of 1911 is a valid contract reserving title in appellants.

The main elements [p. 90] *showing reservation of title* are as follows:

First. W. D. Newerf was appointed *sole agent* to act in the capacity of *agent* in making sales of The Miller Rubber Company's tires.

Third. Appellants agreed to furnish bankrupt *on consignment* a stock of goods for the purpose of supplying customers.

Fourth. "Second party *expressly agrees* that *all goods,* or stock of goods, so furnished by the first party shall, at all times, be and remain *property of the first party until sold and delivered to bona fide customers in the usual manner.*"

Fifth. "Second party agrees to furnish first parties on the first of each month a complete inventory of all goods *belonging* to first parties in the hands of second parties"
or to permit first parties to "take inventory of stock on hand."

Eighth. All goods were delivered by The Miller Rubber Co. f. o. b. Los Angeles, San Francisco or Seattle.

Ninth. "It is further *distinctly* understood and agreed that second party *shall,* upon the expiration or termination of this agreement, or any renewal thereof, or upon its abrogation as herein provided, *surrender*

and turn over to first parties all the property belonging to first parties of whatsoever nature, and shall make full and complete settlement and accounting to first parties for all property that may have been entrusted to second party's custody by virtue of this agreement."

Thirteenth. First party to give credit to second party for any sales made in the territory of second party, of the difference between the net amount realized for said sales, and the net value of such goods charged at prices made second party by first parties.

Fourteenth. All replacements on first parties' tires and tubes to be under the control of first parties, and *to be made from consigned stock of first parties;* and to be made by second party at compensation of 10% of the amount received.

Fifteenth. First parties agree to pay second party actual cost for repair work done only on Miller tires and tubes.

Sixteenth. First parties agree to furnish second party free of charge all samples and advertising matter imprinted with name and address of second party.

Seventeenth. To allow the expenses of W. D. Newerf to Akron, Ohio, at least once each year.

The provisions of said contract which it is claimed evidence a sale are as follows:

Sixth. Second party will make monthly settlement for all purchases from and all shortages *in stock of first parties. Remittances to be mailed to first parties on the 10th of each month for previous month's sales.*

Seventh. When desired by second party, four months' drawing notes at 5% to be accepted by first parties in settlement for purchases made by second parties not exceeding $25,000.00.

Tenth. Prices to second parties in accordance with a price list, Exhibit "A," less 10-5-5-5-5% on casings, and 10-5-5-5% on tubes.

Eleventh. Any reduction in prices by first parties at any time entitled second party to a credit from first parties for the amount of said reduction on all stock on hand.

Twelfth. First parties always to give second parties the lowest prices first parties give anyone for goods.

The first consideration to be given to this contract is the intent and meaning of the parties from reading all of its terms and provisions.

Helpful consideration is found in

Rushing v. Manhattan Life Ins. Co., 224 Fed. 74.

The first syllabus is:

"Every part of a contract must be so construed, if possible, as to be consistent with every other part and effective. It is only when parts of a contract are so radically repugnant that there is no rational interpretation that will render them effective and accordant that any part must perish."

On page 76 the court say:

"The sole purpose of the interpretation of a contract is to ascertain the intention of the parties when they made it. If possible, every part of a contract must be so construed as to be consistent

with every other part and to have effect. It is only when the parts of a contract are so radically repugnant that there is no rational construction that will render them effective and accordant that any part must perish. And the intention of the parties must be deduced, not from specific provisions or fragmentary parts of the agreement, but from the entire contract, because the intent is not evidenced by any part or stipulation of it, nor by the contract without any part or provision, but by every part and term so construed, if possible, as to be consistent with every other part and with the entire agreement. American Bonding Co. v. Pueblo Inv. Co., 150 Fed. 17, 27, 80 C. A. 97, 107, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357; Jacobs v. Spalding, 71 Wis. 177, 188, 36 N. W. 608; Boardman v. Reed, 6 Pet. 328, 8 L. Ed. 415; Canal Co. v. Hill, 15 Wall. 94. 21 L. Ed. 64; O'Brien v. Miller, 168 U. S. 287, 297, 18 Sup. Ct. 140, 42 L. Ed. 469; Pressed Steel Car Co. v. Eastern Ry. Co., 57 C. C. A. 635, 637, 121 Fed. 609, 611; Uinta Tunnel etc. Co. v. Ajax Gold Min. Co., 141 Fed. 563, 73 C. C. A. 35; U. S. Fidelity & G. Co. v. Board of Com'rs, 145 Fed. 144, 148, 76 C. C. A. 114, 118."

Presenting the question, therefore, as to the proper interpretation of this contract, we are unable to comprehend the ruling that under the terms of this contract the title to the *goods on hand* vested in the bankrupt, and, therefore, now belong to the trustee in bankruptcy.

The most that can be said of this contract is that it takes one of two forms:

First. A contract of *conditional sale;* or, *second,* a

contract of *agency*, whereby the goods were placed on consignment, and title to "be and remain the property of the first parties until sold and delivered to *bona fide* customers in the usual manner" [p. 91].

Our interpretation of the contract, and the interpretation of the parties was, and is, a *contract of agency* [pp. 25, 26]. It will be noted that Mr. Newerf, the bankrupt, specifically stated that he received goods on consignment under the 1911 contract, and that

"goods were sold during the month to various custobers, and the amount was figured at the end of the month, and a statement was sent to The Miller Rubber Company for the Miller goods, and sales were made from the *consigned stock* of The Miller Rubber Company" [p. 26].

The stock cards were marked "consigned to W. D. Newerf Rubber Company, Los Angeles" [p. 28]. No change was made in the stock cards after the date of the 1914 contract [p. 28].

Adverting to the provisions of the contract which the trustee claims indicate a sale, we urge that said terms were no different than the terms in the contracts which were in issue in the cases we shall presently cite.

We interpret the contract to mean that the title to the goods passed only "to *bona fide* customers in the usual manner," but that instead of using the usual phrase that the agent, W. D. Newerf, should *guarantee* the sales, he was simply to make monthly settlements for said sales, remitting on the 10th for *previous month's sales* [par. sixth, p. 91]; and that in addition to this (upon the assumption that he would make sales upon time), he was allowed to give notes therefor [par.

seven, pp. 91, 92]; and the prices are shown in paragraph ten [p. 92].

Keeping in mind the terms of paragraphs fifth, sixth, seventh and tenth, *construed with the other terms of said contract*, we refer the court to the case of

Met. Nat. Bank v. Benedict, 74 Fed. 182,

in which Mr. Justice Caldwell, speaking for the court, said:

> "The money to be paid by the commission company was not upon a sale of the goods *to* that company, but upon a sale of the goods *by* that company. The commission company was never to pay for the goods as upon a *purchase by it,* but only to account for the proceeds of the sale of them at prices fixed by the contract."

The cases within which the contract of 1911 clearly comes are as follows:

In re Galt, 120 Fed. 64.

In that case Mitchell & Lewis Company agreed to furnish Frank Galt "farm wagons, etc., *40% discount* from their list prices." "In *lieu* of discount from list prices, all wagons are to be settled for at net prices named on order blank hereto attached, or such prices as are named on other side of this sheet." Further, wagons were to be sold and *accounted for in cash or purchasers' notes.*

Syllabus:

> "Whether a contract by which one party agrees to send to the other goods to be sold by him constitutes a bailment or a conditional sale depends on whether the sender has the right to *compel a*

return of the thing sent, or whether the receiver has the option to pay for the same in money.

"A manufacturing corporation entered into a contract by which it appointed a man its agent for the sale of its wagons at a place named. It agreed to furnish him with wagons at certain discounts from the list prices; the wagons to be sold by him and accounted for as sold in cash or purchasers' notes. All notes taken were to be indorsed by the agent and sent to the company, and, in case they should be for a greater amount than the price of the wagons to be accounted for, the 'surplus of commission' contained therein was to be paid to the agent when and in proportion to the amount collected. All wagons not sold within 12 months were, at the option of the company, to be paid for by the other party in cash or by note, or to be turned over to the company. The contract further provided that the ownership of all wagons, or their proceeds, should remain in the company until settlement should be made therefor, and that the money and effects received in the course of the business of the agency should 'in no case or under any circumstances be appropriated to the private use of the party of the second part.' It also provided that the company might revoke the appointment at its pleasure, and at any time take possession of all or any part of the property. HELD, that such contract was one of bailment, and not of conditional sale, and that *on the bankruptcy of the agent the company was entitled to reclaim the goods remaining in his possession.*"

In the opinion, page 67, the court say:

"In bailment the identical thing delivered is to be restored. In a sale there is an agreement, express or implied, to pay money or its equivalent

for the thing delivered, and there is *no obligation to return.* Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; Union Stock Yards & Transit Co. v. Western Land & Cattle Co., 7 C. C. A. 660, 59 Fed. 49. *The bailee may,* however, *by contract, enlarge his common-law liability without converting the bailment into a sale."*

In re Flanders, 134 Fed. 560.

In that case the American Patent Leather Company had, for several years, sold leather to Flanders, the bankrupt. In 1903 he entered into a contract whereby said company consigned to him for sale upon commission; that he should make advances upon the consignment to the amount of 50% of the invoice value of the goods from time to time consigned, these advances to be made by his notes. These notes were negotiated by the company and were paid by the bankrupt at maturity. Flanders was to receive a commission of 5% on sales, *guarantee the sales,* and *to account monthly for the proceeds,* deducting freight charges and advances. The company had a right to the return of the goods upon demand upon repayment of advancements. Flanders sold the goods in his own name, and upon such terms as he saw fit, also took out insurance in his own name and in case of fire was to account therefor to the company.

The syllabus is:

"Where claimant shipped leather to a bankrupt under an agreement that he should sell it on commission, after making advances to the extent of 50 per cent on the invoice value, and account for the proceeds of sales, less a commission of 5 per

> cent, freight charges, and advances, and guaranty such sales, the claimant being entitled to a return of the goods on demand, the transaction constituted a bailment, and not a conditional sale, though the bankrupt selected his own purchasers, insured the goods in his own name, and fixed the credits to be allowed, etc."

John Deere Plow Co. v. McDavid, 137 Fed. 802.

This case is quoted more than any of the earlier cases upon the subject. In this case the goods were consigned under a contract. The provisions of the contract which would indicate it to be sale are as follows:

The bailee:

1st. To pay all transportation charges.

2nd. Furnish the warehouse room.

3rd. Pay all taxes, licenses, rents and other expenses.

4th. Keep the goods insured for their full value at the expense of the bankrupt.

8th. To render on the first of the month a report of all sales made the month previous, and to *accompany said report with a full settlement, in cash or customers' notes, which said notes the bankrupt agreed to pay.* The further provisions of said contract are that the title of said goods shall be and remain the property of the John Deere Plow Company. The syllabus is:

> "Claimant contracted to consign goods to a bankrupt according to schedules and certain requests of the bankrupt, which agreed to pay transportation charges, furnish warehouse room, pay

taxes, licenses and rents, keep the goods insured, and be personally liable for any damage to goods while in its custody, to make all reasonable efforts to sell the goods, not to sell other makes to the exclusion of goods consigned under the contract, and to sell for enough more than the net schedule prices to pay freight, taxes, expenses, charges and commission for handling and selling the goods, which should be the difference between the net amounts and the gross amounts received from the sales. The contract expressly provided as to what warranties should be given, and entitled claimant to require the goods to be returned. The bankrupt ordered goods under this contract, agreeing to pay therefor in par funds or give notes, and agreed that the title and ownership of all goods should remain in the claimant, which should be subject to its order until paid for. HELD, that the contract was one of agency, and not a contract of conditional sale."

In re Columbus Buggy Co., 143 Fed. 859.

This case has also been very extensively cited. The material terms of the contract in that case were that the goods should be *shipped and billed to the bankrupt as agent* of the Columbus Buggy Company, *at the latter's wholesale prices;* that the bankrupt might sell the goods at such prices as it saw fit and *pay the Columbus Buggy Company its wholesale price* less 5% discount for the goods it sold each month by *the 10th day of the succeeding month;* that it keep the property insured for the benefit of the Columbus Buggy Company, pay all expenses of freight, hauling and storage, and upon the expiration of the contract return that portion of the goods unsold, and that all goods should be on con-

signment, the title to remain in the Columbus Buggy Company "subject to its order *until they were sold and paid for in cash.*" The syllabus fully states the case:

1st Syl. "An agreed price, a vendor, a vendee, an agreement of the vendor to sell and of the vendee to buy for and pay the agreed price, are essential attributes of a contract of sale.

"The power to require the restoration of the subject of the agreement is an indispensable incident of a contract of bailment."

2nd Syl. "The fact that a *contract* provides that the *receiver of goods is to account for those sold at fixed prices* and to retain the difference for insurance, storage, commission and expenses does *not* make the contract an agreement of sale."

3rd Syl. "A contract between a furnisher of goods and the receiver that the latter may sell them at such prices as he chooses, that he will *account and pay for the goods sold at agreed prices,* that he will bear the expenses of insurance, freight, storage and handling and that he will hold the merchandise unsold subject to the order of the furnisher, discloses an agreement of *bailment* for sale, and does *not* evidence a conditional sale."

Dunlop v. Mercer, 156 Fed. 545.

This was a petition to reclaim goods pursuant to a contract under the terms of which the Zimmer Company *in selling goods* to the Western Company did so with the distinct understanding that the title to them should remain in the Zimmer Company until all accounts and notes of the Western Company were paid in cash. On page 548 the court say:

"The provision of this contract that the title to the goods delivered under it should remain in the vendor until the notes and accounts of the vendee had been paid in cash, and that when they were so paid the vendor would execute a bill of sale of the goods remaining in the vendor's possession, discloses the intention of the parties to impose, and effectually imposes, the precedent condition of the payment of the notes and accounts of the vendee upon the vesting of the title to the property in the Western Company."

The syllabus is:

1st Syl. "A conditional sale is one in which the vesting of the title in the purchaser is subject to a condition precedent, or in which its revesting in the seller is subject to a failure of the buyer to comply with a condition subsequent.

"An agreement that the purchaser will buy and *pay for merchandise,* that he may sell it in the regular course of his business, but that the proceeds shall be applied as a credit or as collateral security to the debt of the vendee at the option of the vendor, and that the latter will sell and deliver the goods on condition that the title to them shall remain in him until the notes and accounts of the vendee are paid in cash, is a valid contract of conditional sale."

2nd Syl. "An option in the purchaser to pay, or to refuse to pay, for the property, is not essential to a conditional sale."

In re Pierce, 157 Fed. 757.

The contract there provided (a) that the bankrupt should receive all implements, pay the freight charges, (b) store and insure them at their full value and be

liable for damages thereto, and keep the company harmless from all charges. (c) In case the bankrupt failed to sell the implements received he should either *pay for those unsold at prices fixed,* or hold them subject to the order of the company by reshipment or redelivery to the company free of freight and charges. The bankrupt, not the company, had the choice of these alternatives. (d) The bankrupt to sell upon terms specified, and not to deliver to purchaser before fully settled for by cash or note, and *to be responsible to the company for the regular price of any put out without settlement.* (e) To remit the company all cash received on sales, less commission, and to make settlement for all implements ordered under the contract upon the close of the season or whenever requested. (f) The bankrupt was to guarantee the notes of purchasers. (h) The implements were to be sold on commission and to remain the property of the company until sold. The first syllabus is:

> "A contract under which a company delivered machinery to a bankrupt for sale, which provided that the title to the machinery and its proceeds when sold should remain in the company, that the bankrupt should receive, keep and insure the property, pay all charges thereon, and sell the same at certain prices and on stated terms only, and remit the proceeds to the company less a commission which was to be the difference between the invoice and selling price, and gave him an option to pay for or return such as remained unsold at the close of the selling season, was one of bailment for sale, and not of sale, and the company may reclaim such of the property as passed into the hands of the bankrupt's trustee."

Franklin v. Stoughton Wagon Co., 168 Fed. 857.

In that case a contract was made to deliver wagons on consignment, which contract is set forth in the opinion. We call the court's attention to the following provisions of the contract:

(8) The bankrupt agreed to make out and render to the petitioner on the first of each month a full report of *sales made the month previous*, showing the amounts received in cash and the amount sold on time, and to accompany said report with a full *settlement for all goods so reported sold*, said settlement to be made with cash less 5% for all cash sales, and *promissory notes at four months*, secured by good collateral paper bearing 7% interest after maturity.

(9) To furnish the Stoughton Wagon Company satisfactory security to secure the payment of all obligations or evidence of debt arising under said contract, whether due or not.

It was further agreed that the title and ownership of all the goods were to remain with the wagon company.

That the bankrupt agreed to give to the wagon company *a note for net amount of goods on hand*, per statement, due in six months' time, all amounts paid, together with cash discount of 5%, to be endorsed on back of note. For goods unsold at end of six months a new note to be given.

The court reviews the cases and quotes from some we have already cited, and holds:

"A contract, under which a wagon company shipped wagons to a dealer to be sold so as to realize to such dealer the freight, expenses and a commission above listed price to be settled for at such price when sold either in cash or in purchasers' notes *guaranteed by the dealer,* and which provided that until sold the wagons should remain the property of the company and subject to shipment on its order at any time on repayment of actual freight and charges paid thereon, was one of bailment and not of conditional sale, and on the bankruptcy of the dealer the company had the right to reclaim the wagons remaining unsold from his trustee."

In re Gray, 170 Fed. 638.

In that case goods were sold under a contract, partially set forth at page 642, by which the bankrupt agreed to make *settlement within ten days from date of invoice, either in cash or by notes.* It was further provided that the title to the goods should remain in the petitioner until the indebtedness should be *paid in money.*

The court quotes from Encyclopedia of Law, vol. 6, p. 440, as follows:

"Sales of personal property on condition that title is not to vest in the purchaser until the payment of the purchase money, or upon some other condition, are of very frequent occurrence, and the validity of such sales as between the parties thereto is unquestioned. * * * In most jurisdictions, in the absence of fraud, the rule is the same as to third persons, though in some states it is held otherwise, and in a number of states all

conditional sales must be recorded in order to be valid against third persons without notice."

And from vol. 6, p. 475, as follows:

"Where a sale is made on condition that the vendee shall give a note or other security for the price, the property and the goods so sold and delivered does not vest in the purchaser until the condition is complied with or waived. But title does not necessarily pass when a note is given before the note is paid."

And from the note:

"The giving of a note for a balance due on the price of property sold, with the reservation of title until payment, will not vest title in the vendee in the absence of an express agreement."

It will be observed that in this case, and the one previous, Franklin v. Stoughton Wagon Company, supra, prima facie a sale for cash or notes, unequivocal, except that title was reserved by another provision of the contract.

On appeal the District Court set aside the order of the Referee and held:

5th Syl. "In the absence of a fraudulent intent, a conditional sale reserving title to the goods in the seller until the price is paid, is not invalid as against creditors or purchasers because the goods were furnished for resale."

6th Syl. "A conditional sale contract required payment in 10 days, either in cash or notes, declaring that all notes and open accounts shall be drawn payable at Oklahoma City, with 10 per cent attorney's fees added, and that on default in the

payment of any installment the seller might consider the entire indebtedness due; that the title to and the ownership of all the goods should be in the seller until the buyer's indebtedness had been paid in money. HELD, that the word 'money' was used in contradistinction to 'notes' and did not include notes, so that the acceptance of notes did not constitute a payment sufficient to vest title to the goods in the buyer."

In re Bailey, 176 Fed. 628.

In that case the petitioner, The Parian Paint Company, agreed to furnish the bankrupt paints and supplies *on consignment;* the bankrupt agreeing to keep an itemized statement of all goods sold by him, *and to pay for the same when sold, at the end of every sixty days,* and to return to petitioner, when called upon, all supplies which he had on hand.

The Referee denied the petition to reclaim the property. On appeal the Referee was reversed, and the court held:

2nd Syl. "Where goods were in fact shipped to and held by a bankrupt under a valid consignment contract, to be sold as agent, and not otherwise, the fact that he subsequently gave notes for their price for the accommodation of the payee, which were not enforced, but renewed when due, he being called on only to account for the goods sold, is not conclusive that the contract was changed into a sale."

In re Smith, 192 Fed. 574.

In that case fertilizer was delivered to the bankrupt to sell in the ordinary course of business at prices set

forth, all of which were to be the property of the fertilizer company until the proceeds of sale were turned over to it, and all *notes* given, either by the agent or purchaser, were paid. The contract further provided:

"Spring settlement. Prices in first column net cash July 1st. Prices in second column settlement by note dated July 1st, with interest, and due not later than December 1st, 1911."

At the time each shipment was made the company sent the agent a bill or statement in the ordinary form, showing him "in account with said company." He had sold some fertilizer for cash and received payment therefor; some had been sold and had not been paid for; and some was still on hand. The court held:

> "A written contract under which a fertilizer company shipped fertilizers to a bankrupt for sale shortly before his bankruptcy, HELD on its face to be one of consignment to him as agent, and to entitle the company to reclaim the fertilizer remaining on hand and the amounts collected by the trustee for that sold, in the absence of any course of business between the parties tending to show that the contract was in fact one of sale."

And further ordered that the fertilizer company was entitled to such sums as the receiver or trustee had collected from purchasers of the fertilizer, and the proceeds of the fertilizer sold by the receiver, less expense.

In re Farmers' Co-operative Co., 202 Fed. 1005.

The court held:

> 2nd Syl. "That a conditional sale contract under which property was delivered to a bankrupt was not recorded as required by the laws of the

state until within four months prior to the bankruptcy does not deprive the seller of the right to reclaim the property if unpaid for, since, never having become the property of the bankrupt, the contract could not operate as a 'preferential transfer' within the meaning of Bankruptcy Act July 1, 1898, c. 541, p. 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by act Feb. 5, 1903, c. 487, p. 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1506)."

Wood M. & R. Co. v. Vanstory, 171 Fed. 375.

This case is a precedent, as the court discusses the questions under consideration. In that case certain mowing and reaping machinery was placed with one Vanstory, the bankrupt, for sale.

On page 380 the court say:

"It was also shown that the bankrupt occasionally disposed of these machines held under this contract, and, in each instance, the machines thus disposed of were charged to the bankrupt. In some cases, however, appropriations of this kind were not shown until the yearly inventory was taken, at which time the bankrupt was required to make settlement for the same."

We further especially refer the court to the opinion and language quoted from Foreman v. Drake, 98 N. C. 311.

The first syllabus is sufficient for the present controversy:

"Petitioner, a manufacturer of farm machinery, shipped machines by the car load to the bankrupt, which was a hardware company, under a contract by which the bankrupt received and stored the

same and from time to time shipped machines out on orders from petitioner. The machines were not charged to the bankrupt, nor invoiced as part of its stock, but it was paid an agreed price for storage and transfer. It had the privilege of selling any of the same to its own customers, *and machines, when sold, were charged to it.* At the end of the year an inventory was taken by petitioner of the machinery then on hand in storage. HELD, that the transaction was a bailment, the title remaining in petitioner, and that on the bankruptcy it was entitled to reclaim possession of the machines on hand from the bankrupt's trustee."

L. C. Smith Co. v. Alleman, 199 Fed. 1.

1st Syl. "Claimant delivered a typewriter to a bankrupt under a contract providing that it was hired for the term of seven months at a rental of $100 payable in installments, the machine to be returned to claimant at the expiration of the term or on default of any payment, and that at the expiration of the term, on payment of $1.00 in addition to the sum paid for rental, the claimant would execute a bill of sale of the machine to the bankrupt. HELD, that the writing on its face constituted a good bailment, and not a conditional sale."

2nd Syl. "Where the words of a written contract are equivocal, evidence of the subsequent acts of the parties thereunder is admissible to show how they understood the contract, on the theory that such acts are a binding practical construction thereof; but, if the meaning of the contract is clear, the intention of the parties must be determined by the language, and evidence of a practical construction is inadmissible."

3rd Syl. "While the mere use of the words 'lease' and 'rental' in a written contract relating to personality will not convert into a bailment what would otherwise be a conditional sale, yet, even in a contest where execution creditors are concerned, if the contract by its term is a bailment, the courts will give it effect as such to the exclusion of the execution creditor."

4th Syl. "To constitute a contract a conditional sale of personal property, the title thereto must have passed to the buyer when the property was received into its possession."

5th Syl. "Claimant leased a typewriter to a bankrupt under a written contract for hire for the term of seven months at a rental of $105, payable $30.00 on the execution of the agreement and monthly installments thereafter. It also provided for the return of the machine at the end of the time or on default, and in case the payments were fully made the bankrupt was to be entitled, in consideration of the further payment of $1, to a bill of sale at the end of the term. HELD, that the fact that payments of unequal amounts were made and accepted at irregular intervals up to a time shortly before the intervention of bankruptcy proceedings, and the failure of the bankrupt to return the machine at the end of the term, and of the claimant to pursue its remedy to retake the same until six months after the expiration of the term and after the intervention of bankruptcy, did not change the contract from one of bailment to a conditional sale so as to deprive the claimant of its right to recover the property against the bankrupt's trustee."

It is interesting to note that this is a case arising in the United States Court in Pennsylvania, under the

law of which state reservation of title, conditional sales and like contracts are void as against creditors; and that the United States Courts follow the local law upon the subject.

In re Reynolds, 203 Fed. 162.

In that case the Birdsell Mfg. Co. filed a petition to reclaim certain property in the possession of the trustee. The fourth clause of said contract is as follows:

"Agent shall, on the first day of each month, and when requested to do so by the company, or its duly authorized representative, render a statement showing all goods on hand, and all goods sold during the preceding month, and shall at once settle for goods sold, in cash, at the invoice price thereof, less a discount of five per cent In case agent shall sell any wagons on time, he may settle with company for same by executing his note due in four months, without interest, for the invoice price of goods sold, and in such case shall not receive five per cent discount; but the amount of unpaid notes owing by agent to the company shall not at any time exceed the sum of $100.00."

On page 164 the court say:

> "The fourth clause of the contract is mostly relied upon in support of the position that it was a conditional sale. By virtue thereof undoubtedly on the 1st day of each month all notes and accounts for wagons sold on time became the property of the bankrupt. The bankrupt at that time had to account for all goods sold during the preceding month, and for such as were sold on time he could settle to the extent of $100 by executing his four months' note without interest. But this did *not* have the effect of making a *sale of such goods as had not been sold.* In case of Parlett v.

Blake (C. C. A. 8th Cir.), 26 Am. Bankr. Rep. 25, 188 Fed. 200, 110 C. C. A. 72, 39 L. R. A. (N. S.) 620, it was assumed that an agency contract, containing a provision that at the expiration of its term the agent should buy all goods not theretofore sold at the then current prices, was not a sale contract before the expiration of the term. It became such only upon the expiration of the term as to goods then unsold. So here this contract, otherwise an agency contract as to goods *not* sold, is *not* made a *sale contract* as to them because on the 1st day of each month it became a sale contract as to the proceeds of goods sold during the preceding month on time. I think, however, that the petitioner's right is *limited* to the *unsold goods*. He has none as to the proceeds of goods sold because of this fourth clause.

"The order of the Referee is reversed, with directions to allow petitioner the unsold goods claimed by it."

Berry Bros. v. Snowdon, 209 Fed. 336 (U. S. C. C. A. 9th Cir.).

In that case the Referee rejected the claim of the appellant for certain goods placed on consignment. The contract, among other things, provided:

"The party of the second part agree to report on the first of each month the amount of goods sold by them from said stock for which party of the first part will render an invoice at the regular terms and prices of such goods according to the quantity sold."

And again as follows:

"The party of the first part will render a memo invoice to the party of the second part of all goods shipped on consignment, and will credit to such con-

signment account the amount of goods that are sold each month from said stock, and the party of the second part agree to pay for such goods sold by them or taken from consigned goods while in their possession on the terms which they are billed by the party of the first part on their regular invoice."

On page 339 the court say:

> "The invoices, or 'detailed statements' as they are called in the stipulation of the parties, did not change the terms of the written agreement under which the property was sent to the consignees. 'An invoice,' as said by the Supreme Court in Dows v. National Exchange Bank, 91 U. S. 618, 630 (23 L. Ed. 214), 'is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity and cost or price of the things involved, and it is as appropriate to a bailment as it is to a sale. * * * Hence, standing alone, it is never regarded as evidence of title.' See, also, Sturm v. Boker, 150 U. S. 312, 328, 14 Sup. Ct. 99, 37 L. Ed. 1093.
>
> "And that neither of the parties to this contract considered that it was in truth anything more than it purported to be, to-wit, a mere consignment of the goods for sale upon the terms and conditions therein stated."

The syllabus is as follows:

> "Claimant shipped to bankrupts, who owned a warehouse for the storage of goods and also a salesroom at a different place in the city where they sold goods, certain goods under a contract which stated that the goods were 'consigned for sale.' Pursuant to the terms of the contract claimant paid the freight on the goods, cartage to the

warehouse where they were stored, and also storage and insurance thereon. An invoice or detailed statement of the goods was sent to bankrupts, who had the privilege of removing any of them to their store for sale when desired, sending a statement of the goods removed each month to claimant, which then sent them a regular invoice charging them with the goods so removed. From time to time claimant, with the knowledge of bankrupts, withdrew parts of the goods and sold them on its own account, and within four months prior to the bankruptcy it withdrew all that remained. HELD, that the contract was not one of sale, either absolute or conditional, but of bailment, under which title did not pass to any of the goods except those removed by, and regularly billed to, bankrupts."

In re Killian Mfg. Co., 209 Fed. 498.

The syllabus sufficiently states the case and the law:

"Where a bank, in accordance with custom, furnished credit to purchase silk, taking title thereto in its own name and delivering the same to certain bankrupts for manufacture under a trust receipt binding the bankrupts to hold the goods, or the proceeds thereof, for the bank until the purchase price was paid, the title never passed to the bankrupts, and their agreement while insolvent to return the goods to the bank was not a preference."

This is another case arising in Pennsylvania, where the state court decisions hold that conditional sale contracts, and the like, are void as to creditors.

In re Grand Union Co., 219 Fed. 353.

In that case the Grand Union Company, engaged in

selling pianos on the installment plan, contracted with the Hamilton Investment Company, by which the former agreed to "sell" and the latter agreed to "buy" from time to time piano leases on certain terms. The Grand Union Company having become bankrupt, it was contended by the Hamilton Investment Company that all money that had been collected belonged to it. Upon a careful construction of the contract the Circuit Court of Appeal for the second circuit held it was not an absolute sale of the leases, but a transfer as security for the loan. The first syllabus is:

> "A 'sale' is a transfer of property in a thing for a price in money. The transfer of the property in the thing sold from buyer to seller for a price is the essence of the transaction, and the transfer is a transfer of the general or absolute property, as distinguished from a special property, in the thing."

General Electric Co. v. Brower, 221 Fed. 597 (C. C. A. 9th circuit).

This is a very recent case which came before this Honorable Court, and is conclusive of the case at bar.

Mr. Justice Gilbert, in beginning the opinion, says:

> "It is the contention of the appellee that where goods are delivered by a manufacturer to a seller, and the latter is *allowed to place them with his stock of goods*, and sell and dispose of them in the ordinary course of business, to manage and control them as other goods, and where he pays all the taxes, cartage, storehouse charges, and all other expenses in connection therewith, and *agrees to pay for such goods so disposed of*, and there is neither an agreement to return the goods nor an

agreement to account for the proceeds of the sale of goods as such, there is no bailment."

(The court refuses to follow Penny & Anderson, 176 Fed. 141, as inapplicable to the case, and which case will be cited by counsel for the trustee in bankruptcy.)

The contract, among other things, provided:

1. The agent guaranteed that all lamps sold by it would be paid for.

2. The agent assumed liability for loss.

3. The payment of certain expenses.

4. The payment of insurance.

5. No provision that the agent should keep the money arising from said sales separate and apart from its other money.

6. No provision that the agent should turn over the money received from the sale to the manufacturer.

7. The agent was to pay for the lamps sold each month, less 29% for making the sales. The said provision is in paragraphs 5 and 7 of said contract as follows:

"The agent shall be allowed, as compensation for the performance of all obligations hereunder, the difference between the amounts received from the sale of the lamps and their value on the basis of a discount of 29% from list prices as to the time fixed by the manufacturer."

"At the time for rendering each such report the agent shall pay to the manufacturer the value of all lamps lost from the aforesaid stock, or damaged, on a basis of list prices less a discount of 29%."

The syllabus is:

"By a contract between a manufacturer of incandescent lamps and the A. Company, it was appointed as agent to sell such lamps, and accepted such appointment. The contract further provided that the manufacturer should maintain a stock of lamps in the custody of the agent; that the quantity of lamps and the length of time they should remain in stock should be determined by it; that all the lamps should remain its property until sold; that the proceeds of sales should be held for its benefit; that the agent should return lamps unsold to the manufacturer at any time, if directed; that the agent should sell at prices and on terms fixed by the manufacturer and state on all bills and invoices that it was agent for the manufacturer; and that the agent guaranteed payment for all lamps sold and would pay to the manufacturer each month an amount equal to the sales value of lamps sold, less the agent's compensation, which was to be the difference between the selling prices and the value of the lamps at a discount of 29% from list prices. HELD, that there was an agency and not a sale, and, upon the bankruptcy of the agent, the lamps in its possession did not pass to its trustee in bankruptcy, though the contract contained no provision that the agent should keep the proceeds of sales separate and apart from its other money, or that it should turn over the money received to the manufacturer, and though it did provide for payment by the agent of all expenses in the storage, cartage, transportation, handling and sale of the lamps and all expense incident thereto."

8. Paragraph 6 of the contract [p. 599] provides:

"The agent shall pay over to the manufacturer, not later than the 10th of every month, an amount equal to the total sales value of all lamps sold hereunder, less the compensation due the agent, for which collections have been made by the agent during the preceding calendar month, and a further amount equal to the total sales value, less the compensation due the agent on all lamps sold by the agent to customers whose accounts covering such lamps are, on the first of the month, past due, according to the manufacturer's standard terms of payment."

Ellet-Kendall Shoe Co. v. Martin, 222 Fed. 851.

In that case a stock of shoes was placed with Brown & Norris, who afterwards became bankrupt. The agreement provided:

1. Brown & Norris to guarantee the sales.
2. Keep the stock insured.
3. All unsold stock might in the future be taken back.
4. Make weekly reports accompanied by check in payment of goods sold.
5. That said assignment account should be fully settled in six months, "or a final settlement shall be made in less time than six months if it can conveniently be done."

On page 855 the court uses significant language from the case of Sturm v. Boker, 150 U. S. 329:

> "The recognized distinction between bailment and sale is that when the identical article is to be returned in the same, or in some altered form, the contract is one of bailment and the title to the property is not changed."

On page 855 the court further say:

> "They made such an agreement, which is essentially a contract for the consignment of the goods to the bankrupts for sale on commission, and both parties acted upon it prior and up to the bankruptcy as being such a consignment upon the terms specified in that agreement. It should not *now* be held a contract of sale and purchase of the goods for the benefit of the general creditors of the bankrupts, unless its terms imperatively require that it be so held."

On page 856 the court quotes very decisive language. Mr. Justice Caldwell, speaking for the same court, in Met. Nat'l Bank v. Benedict, 74 Fed. 185:

> "Moreover, parties have the undoubted right to make their own contracts, and to put their own construction upon them, and to regulate their rights and liabilities thereunder. If the court 'leaves the parties to be governed by their understanding of their own language, it, in effect, enforces the contract as actually made. That they should be so permitted to construe their own agreement accords with every principle of reason and justice.' * * * And when both parties to a contract, acting in good faith, are agreed as to its meaning, and their rights under it, a stranger having no interest in the subject matter of the contract cannot insist that a different interpretation shall be put upon it, or compel the parties to put that interpretation upon it, which will benefit him. * * * This is not a case where the parties to the contract themselves differ as to its meaning and purpose. Here the parties are agreed that the contract they made was one of bailment. It is a third party who is demanding that the contract

shall not have effect according to the agreement and intention of the parties. On this state of facts the bill of sale invested the bank with the rights of the commission company only; and, as the commission company had no right to the property, the bank has none."

The first syllabus is:

"Whether a contract under which a stock of shoes was shipped was a sale, or merely a consignment for sale, must be determined from the terms of the contract, the test being whether the specific goods were to be returned if not sold, or another thing of value might be returned instead."

The court held that the referee erred in denying the claim of the petitioner to the shoes in controversy, and reversed the decree of the District Court, with directions to allow the claim of the petitioner to the shoes; or, if sold, to award the petitioner the value thereof.

In re National Home & Hotel Supply Co., 226 Fed. 840.

In that case the points urged in favor of the trustee's contention are the following:

"(1) There was no reservation of title to the proceeds of the goods sold, nor was bankrupt required to keep separate or remit the identical money taken in on sales of petitioner's goods, and bankrupt co-mingled such proceeds with its general funds. (2) Bankrupt paid the freight. (3) Petitioner's wares were not kept separate from other goods in bankrupt's store. (4) Bankrupt fixed the retail price and terms of sale. (5) Sales made by bankrupt of petitioner's wares conveyed good title to the purchaser. (6) No ex-

press provision in the agreement relating to the returning of unsold goods. (7) Petitioner desired to protect herself. (8) Petitioner did not expressly reserve for herself the right to sell the goods. (9) Only the first invoice was marked 'Consignment' by petitioner. (10) There were no restrictions on sales. (11) Bankrupt took a discount from the list price in remitting. (12) Goods were shipped for the purpose of resale. (13) Bankrupt sold in its own name. (14) No accounting was had for the month of July. (15) Petitioner did not carry insurance on the merchandise."

On page 845 the court say:

"I consider the fact that there was no obligation on the part of the bankrupt to pay for any *unsold* goods, and no right reserved in the petitioner to *compel* bankrupt to pay therefor, to be the greatest obstacle in the way of establishing a sale with a reservation of title as contended by counsel for trustee. I think the particular nature of the wares in question is peculiarly adapted to a contract of consignment. While there is nothing in the record on the subject, we all know that hand-painted china, like hand embroidery, is often handled as a side line and under an agreement of agency and consignment.

"In addition to the foregoing, and supporting petitioner's theory, the conduct of the parties, from beginning to end, shows, not only that they considered the transaction a consignment, but that they actually in good faith lived up to the agreement that they had made and treated the goods as consigned goods."

The syllabi state the facts and the law:

1st Syl. "Where a transaction between a manufacturer and a retail dealer, adjudged a bankrupt, created a *bona fide* agency and consignment contract, which was performed, the manufacturer could reclaim the merchandise from the trustee."

3rd Syl. "In determining whether a contract between a manufacturer and a retail dealer, adjudged a bankrupt, was one of agency and consignment, so that the manufacturer could reclaim the merchandise from the trustee, or a sale with a reservation of title as security, unaccompanied by any proper instrument filed or recorded, so that the trustee could retain the merchandise, the court must take into account what manner of contract the parties intended to make, what they agreed to do, and the manner in which they carried it out in actually working under it."

4th Syl. "A retail dealer opened negotiations with a seller of hand-painted china, suggesting consignments. The seller selected the merchandise, shipped it, and kept the dealer supplied without orders from him. An accounting was given by the dealer after 30 days, and he was required to pay only for pieces sold. The merchandise remained the property of the seller until sold. The parties by conduct showed that they considered the transaction a consignment. The dealer presented to the seller an accounting, headed 'Sold for (Seller).' The seller did not take out insurance on the merchandise, which was commingled with other goods. The dealer failed to give the merchandise a separate department as agreed, but the seller was ignorant of it, and all the merchandise bore the name of the seller. No person was defrauded by the transaction. HELD, that the

merchandise was consigned to the dealer, and, on his being adjudged a bankrupt, the seller could reclaim articles on hand from the trustee, notwithstanding Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act June 25, 1910, c. 412, 36 Stat. 838, and the trustee must also pay the proceeds of any merchandise sold by the receiver, and account for merchandise sold by the dealer prior to filing of petition in bankruptcy and not accounted for; so that the seller might participate to that extent as an unsecured creditor."

The second syllabus has no bearing upon the case at bar because under California law no instrument is required to be filed or recorded.

Ludvigh v. American Woolen Co., 231 U. S. 522, 31 Am. Bankr. Rep. 481.

In that case goods were consigned by a woolen company to Horowitz & Son, who afterwards went into bankruptcy. The woolen company having taken some of the goods from the bankrupts prior to the institution of the proceedings in bankruptcy, a petition was filed against the woolen company to recover therefor. The District Court held in favor of the trustee, which ruling was reversed by the Circuit Court of Appeals for the Second Circuit, which decree was affirmed by the Supreme Court of the United States.

The provisions of said contract bearing upon the subject under consideration are as follows:

"IV. Said party of the second part (the Niagara Company) agrees to sell such merchandise to such persons as they shall judge to be of good credit and

business standing, and to collect for and in behalf of the party of the first part (the Woolen Company), all bills and accounts for the merchandise so sold, and to immediately pay over to the said party of the first part any amount collected as aforesaid, immediately upon its collection, minus, however, the difference between the price at which said merchandise so collected for has been invoiced to the party of the second part, and the price at which said merchandise has been sold as aforesaid by the party of the second part.

"V. Said party of the second part does hereby guarantee the payment of all bills and accounts for merchandise, possession of which is delivered to it under this agreement, and it hereby agrees, in case any merchandise delivered under the provisions of this agreement by the party of the first part to the party of the second part is not accounted for to the party of the first part under the provisions of clause IV, of this agreement, to pay to the party of the first part the invoice price of said merchandise, and thereupon title to said merchandise, or to the proceeds thereof, so paid for, shall pass to the party of the second part, and shall then be exempted from the provisions of this agreement.

* * * * * * * * *

"VIII. This agreement shall continue for one year. If, for any reason, this agreement terminates, all of the merchandise, possession of which is held by the party of the second part under this agreement, shall at said termination be immediately returned to the possession of the party of the first part."

In relation to these provisions, paragraph V, standing alone, would indicate a sale was indicated, second party to pay the first party the invoice price for the merchandise "and thereupon title to said merchandise,

or to the proceeds thereof, so paid for, shall pass to the party of the second part." Construing these sections together the court say:

> "That part of section 5 relating to goods not accounted for refers specifically to the provisions of clause 4 of the agreement, which deals with goods sold only. The entire contract must be read to ascertain the purpose of the parties, and we find in clause 8, limiting the agreement to one year, the provision that if for any reason the agreement terminated, *all* of the merchandise, the possession of which was held by the Niagara Company under the agreement, should be immediately *returned* to the Woolen Company. * * * We find that the agreement was really one of bailment for the purpose of sale, with the right to return the unsold goods. There is nothing illegal in such contracts when made in good faith."

It was further insisted that the conduct of the parties showed their real purpose and understanding were to make an effectual sale. The following matters and things were relied upon to show a sale:

1. Horowitz selected the goods, whereas under the contract the Woolen Company had the right to turn over any it saw fit.

2. A letter from an agent of the Woolen Company in answer to a request to take back goods "contained the statement that the Woolen Company could *not*, at that date, consent to have fall goods, made expressly for the Horowitzs, and delivered in accordance with the terms of the agreement, turned back in the stock."

3. That the goods were not kept separately, but the tags of the Woolen Company were left upon the goods.

The evidence in the case at bar shows that the goods were tagged [p. 33] and that there were signs up with The Miller Rubber Company's name on [p. 40].

The court then say: "Against these considerations are the positive terms of the agreement found to be free from fraud, and fairly entered into, which, as we interpret them, permitted *goods unsold to be returned,*" and closes:

> "We are unable to find that this contract was either actually or constructively fraudulent, and hold, as was found in the Circuit Court of Appeals, that it was what it purported to be,—a consignment arrangement with the net proceeds of sales to be accounted for to the consignor, and with the right to return the unsold goods. Finding no error in the decree of the Circuit Court of Appeals, the same is affirmed."

See also

Bryant v. Swafford, 214 U. S. 279, syllabus and opinion.

California Cases.

Assuming that the question hinges upon the law of California, with reference to reservation of title in a consignor of goods, or reservation of title in a conditional sales contract, we submit the following California cases:

Rodgers v. Bachman, 109 Cal. 552;

Wise v. Collins, 121 Cal. 147;

Van Allen v. Francis, 123 Cal. 474.

In the latter case the first syllabus is:

> "Conditional sales of personal property are recognized in this state to the fullest extent, and even *bona fide* purchasers from the person to whom personal property is delivered under an executory contract of conditional sale, get no valid claim to the property."
>
> Lundy v. White, 128 Cal. 170.

The second syllabus is:

> "In case of a conditional sale, a purchaser who has broken the conditions upon which the sale was made can transfer no rights to a purchaser or mortgagee of the property conditionally sold, and the vendor may replevy the property from the possession of a purchaser and mortgagee of the vendee."

Under these cases it is apparent that if the case arose in the California courts to construe the contract of 1911, that The Miller Rubber Company would have the undoubted right to recover the goods.

Cases Cited by Appellee.

Because of the early hearing of this case it is probable that the appellants will not have time, under the rules, to print and file a closing brief; and for that reason submit herewith the cases which it is understood counsel for appellee will cite.

Penny & Anderson, 176 Fed. 141.

This Honorable Court has disapproved the ruling in that case in the very recent case of General Electric Co. v. Brower, *supra*.

In re Garcewich, 8 Am. B. R. 149.

That case arose under a petition to reclaim certain goods. The case is poorly reported because it cannot be ascertained what the terms of the contract were. It is stated that "the goods were sold to the bankrupt by the United Shirt & Collar Company *upon credit,* and upon the understanding that the title to such of them as should not be sold by the bankrupt should remain in the vendor until the payment of the purchase price." The sale of the goods *upon credit* "is inconsistent with the continued ownership of the vendor"—as stated by the court in the opinion—and so far as can be gathered from the case, it is held that the property vested in the trustee in bankruptcy. If it could be argued that the case went further than this it is clearly and unmistakably opposed to the overwhelming weight of authority on the subject.

In re Miller & Brown, 14 Am. B. R. 439.

That case arose in Pennsylvania, and the court held that the transaction was "nothing more than what is known in the law as a contract of 'sale and return,' and the title to the unsold portion of the goods so consigned, on hand at the date of adjudication, passes to the trustee in bankruptcy." The facts further show "the right to return did not depend upon bailment, but upon the mere will of the consignee, however moved," and that the contract was a sale and the title vested. The case, therefore, is clearly distinguishable from the cases applicable to the facts in the case at bar.

In re Harriet v. Wells, 15 Am. B. R. 419.

In that case the bankrupt having fallen behind in

her payments, it was agreed that the goods on hand should be consigned to her. The court held that as to these goods "there could be no such shifting over from one account to the other as was attempted"; and that as to said goods "on hand at the time, or subsequently sent to her * * * they were invoiced and charged to her by the Silk Company at definite prices"; that she "was only to be responsible for what she sold, having the privilege—or being obliged, if you will—to return what she did not. On the other hand, she had the right to retain the whole by paying the price, which practically made it what is known in the law as a case of 'sale or return,' in which the title passes to the party to whom the goods are to be delivered, subject to the option of returning them if he so desires."

The facts clearly distinguish the case, therefore, from the facts in the case at bar.

In re Harrington, 32 Am. B. R. 828.

That was a petition to reclaim certain automobile parts in the possession of the trustee in bankruptcy. The case is distinguishable from the case at bar as found by the court, by the facts as follows:

1. That neither of the parties understood or believed that the terms of the contract were to be lived up to.

2. No reservation in the vendor in the proceeds of the sales, or as to insurance, or mingling the parts with other goods.

3. The provisions of the contract "as to the retention of title were not insisted upon by the vendor, and *were waived,* as is plainly indicated by the letter of

October 31st, 1912, contained in the agreed statement of facts."

The above case came before the Circuit Court of Appeals in the case of Flanders Motor Co. v. Reed, 33 Am. B. R. 842, and as gathered from the opinion the case is distinguishable from the case at bar as follows:

1. Nothing to show the course of dealing that was followed.

2. No provision as to the proceeds of the sales.

3. No provision that the parts remaining unsold at the end of the year should be returned to the vendor, the court, for that reason, differentiating it from Ludvigh v. American Woolen Company, *supra.*

4. "No provision to prevent the vendee from consuming the goods, or selling them and applying the proceeds to his own use, and *In re* Garcewich therefore applies."

John Deere Plow Co. v. Mowry, 34 Am. B. R. 384.

That case arose upon a petition to recover certain personal property, and the case is clearly differentiated from the case at bar:

1. As to the manufacturer's warranty.

2. No goods to be returned by the vendees.

3. No countermand of the order could be made.

4. Full purchase price matured in case of death, insolvency, fire loss, or selling out the business.

5. The vendee to give purchase notes which must be secured.

6. The reservation of title in company based upon a separate consideration.

Accordingly the court held that the provisions of the contract *amounted to a chattel mortgage,* and that the instrument should have been *recorded;* and because it was not recorded it was invalid against the trustee in bankruptcy.

We urge, therefore, that none of these cases, cited by counsel for appellee, are applicable to the facts in the case at bar; and that if such a construction might be placed upon any one of them, the ruling there is clearly contrary to the law upon the subject as shown by the cases which we have cited.

Conclusion.

We urge, therefore, that The Miller Rubber Company is entitled to the goods under the 1911 contract, upon the following grounds:

First: Because it reserved title thereto, and that this provision is especially applicable to all goods on hand, and unsold.

Second: That no fraud is shown, and no course of dealing had grown up between the parties, indicating a different intention.

Third: Because the bankruptcy proceedings necessarily terminated all contracts between the parties—the only provision in the bankruptcy law in that respect being in section 2, clause 5, authorizing a trustee, under orders of court, to conduct a business for a limited period.

II.

The said District Court errred in its finding, decision and judgment, under the evidence, and the law, that the contract and transaction therein set forth between said bankrupt and said petitioner, for reclamation, constituted a sale of the said goods by the petitioner to the said bankrupt.

This error is correlative to the first point or assignment of error; and we, therefore, respectfully refer the court to the cases cited thereunder, and urge that the court erred in holding that the transaction under the contract of 1911 constituted a sale of the *goods on hand* by The Miller Rubber Company to the bankrupt.

III.

The said District Court erred in failing to find, under the evidence and the law, that the title to all of said goods in the hands of said bankrupt or in transit on July 1, 1914, was and is in the petitioner for reclamation, and that the said petitioner for reclamation had and has a present right to all of said goods, wares and merchandise.

This assignment of error is also correlative to the first assignment of error, except that herein we make an affirmative assignment of error that the court erred in failing to find that The Miller Rubber Company has the present right and title to all of the goods, wares and merchandise. The statement of the facts, and the cases relied upon in the first assignment of error, correctly state the rule upon the subject under consideration.

IV.

The said District Court erred in not finding, under the evidence and the law, that the contract of June 11, 1914, and the supplement thereto, between the petitioner, The Miller Rubber Company of California, and the said bankrupt, superseded and annulled the said contract of November 6, 1911, as aforesaid.

This point is materially important because we claim that the contract of 1911 was wholly superseded and annulled by the express provision of the contract of 1914.

Let us review the facts briefly to show the situation of the parties:

1. The officers of The Miller Rubber Company, and The Miller Rubber Company of California:

Jacob Pfeiffer, president of both companies.

F. B. Theiss, treasurer of both companies.

Wm. F. Pfeiffer, secretary and general manager of both companies [p. 38].

2. Only one set of books were used to handle the business of both companies [p. 38].

3. All property belonged to The Miller Rubber Company [pp. 39, 149, 151, 154].

4. The bankrupt knew and understood that The Miller Rubber Company of California was organized to act solely as the agent of The Miller Rubber Company, and, "that so far as being a separate corporation, it was just the same corporation. Only organized in that way to comply with the laws of this state" [p. 27].

5. The Special Master found that The Miller Rubber Company of California was organized for the purpose of acting as the agent in handling and selling of

the goods of The Miller Rubber Company [p. 63]. The Special Master also found that the officers of the two companies are the same, and that The Miller Rubber Company of California was owned and controlled by the stockholders of The Miller Rubber Company, of Ohio [p. 63].

6. The bankrupt dealt with Mr. Wetsel as the representative of The Miller Rubber Company in the preparation of the contract of 1914 [p. 27].

7. The business of the bankrupt was at all times carried on between him and The Miller Rubber Company in the same way except that a shorter system was put in by the bankrupt [pp. 28-29].

8. The letters and telegrams were sent by the bankrupt to The Miller Rubber Company under the contract of 1914 [pp. 31, 32, 47, 51, 52, 58].

9. Goods were received from The Miller Rubber Company, of Ohio, marked The Miller Rubber Company of California, since the beginning of the contract of 1914 [p. 27].

10. The Prudential Rubber Company nowhere appears in the proceedings, and the rights of the parties are to be determined without regard to said company.

11. The contract of 1914 specifically provides:

"This contract and supplement shall supersede all contracts, agreements or understandings of any nature now existent between The Miller Rubber Company, or The Miller Rubber Company of California, and W. D. Newerf Rubber Company, or W. D. Newerf, and such contracts, agreements, and understandings shall be, and are considered null and void, except as to the unpaid accounts."

12. The contract of 1911, and the contract of 1914, are actually signed by Wm. F. Pfeiffer for The Miller Rubber Company and The Miller Rubber Company of California, respectively, and both are actually signed by W. D. Newerf, the bankrupt.

Notwithstanding the provision of the contract of 1911 that it shall remain in force until November, 1916 [p. 94], it must be true, beyond peradventure, that the contract of 1914 wholly annulled and superseded the contract of 1911.

To illustrate: Supposing it were claimed in this proceeding by The Miller Rubber Company, that The Miller Rubber Company of California is not only a distinct entity, but that it had no relation, and that it is not the agent of, The Miller Rubber Company? A statement of the foregoing facts, which would be admitted by the parties to be true, will lead the court to the conclusion that The Miller Rubber Company of California was appointed as the agent of The Miller Rubber Company, of Akron, Ohio; and, therefore, that it not only had the right and authority to make the contract of 1914, but to cancel all other previous contracts between the parties, or in which the parties were interested pertaining to, and covering the subject matter under consideration, to-wit: the agency and sale of goods of The Miller Rubber Company, in California.

The record is replete, as shown by the findings of the Special Master that the parties have, at all times, acted under the contract of 1914 since it went into effect [Special Master's report, pp. 26-40, 78, 79, 80, 85, 87].

We urge, therefore, that the contract of June 11th, 1914, legally annulled and superseded the contract of November 6th, 1911; and that the contract of 1911, therefore, entirely falls from view in the consideration of the case.

ALLEGATIONS OF AMENDED PETITION.

It is proper, at this time, to call the court's attention to the allegations of the amended petition, seeking the recovery of goods delivered between June 1st, 1914, and March 17th, 1915 [p. 8]. It is our contention that, in view of the foregoing facts, to-wit: the annulment of the contract of 1911 by the contract of 1914, that, by a fiction of the law, all goods held by the bankrupt under the 1911 contract passed to his possession under the 1914 contract, and were necessarily held under said contract, and not otherwise; and that the allegations were properly framed to cover goods delivered under the 1914 contract only.

V.

That said District Court erred in its finding, decision and judgment, that the said contract of November 6, 1911, between the petitioner and the bankrupt, is still in force and effect.

This is a correlative error of the one just stated, and we respectfully refer the court to the argument and reasons assigned under the fourth point herein.

VI.

The said District Court erred in not finding, under the evidence and the law, that the trustee in bankruptcy herein, by taking possession of the property in the hands of said bankrupt or in transit on June 11, 1914, and attempting to sell and dispose of all of said property, and in making no attempt to carry on the business, would necessarily abrogate and did terminate the said contract of November 6, 1911, if it had had any force and effect after June 11, 1914.

Counsel for The Miller Rubber Company were required to appear in court to prevent the trustee from selling the goods alleged to have been received under the 1911 contract [p. 115]. This would clearly indicate the intention of the trustee not to attempt to carry on the business as provided by section 2, clause 5, of the Bankruptcy Act, which he might have done for a limited period. This is assigned as another reason why the contract of 1911 was necessarily abrogated and terminated.

VII.

The said District Court erred in not finding, under the evidence and the law, that the contracts and transactions therein set forth between the petitioner and the said bankrupt constituted and appointed the said bankrupt the agent of The Miller Rubber Company (or ostensibly the agent of The Miller Rubber Company of California) for the sale of all goods on hand or in transit on July 1, 1914; and that the title to all of said goods in the hands of said bankrupt or in transit on July 1, 1914, and now in the hands of the trustee in bankruptcy herein, and remaining unsold, was and is in the petitioner, The Miller Rubber Company, for reclamation.

Upon this point we urge that the court should have found as claimed in our first assignment of error, that the title to all goods in the hands of the bankrupt, at the date of the filing of the petition in bankruptcy, to-wit: March 19th, 1915 [p. 6], was vested in The Miller Rubber Company, and that its petition to reclaim said goods should be sustained.

We further respectfully refer the court to the cases and argument under the first assignment of error.

VIII.

That said District Court erred in its finding, decision and judgment that The Miller Rubber Company of California is a distinct entity from The Miller Rubber Company, of Ohio, and in all the matters and things involved herein, it must be so adjudged, upon the ground that The Miller Rubber Company of California was and is at all times the agent of The Miller Rubber Company and that said bankrupt knew and understood at all times that all of his said transactions and contracts were, in reality, with the parent corporation, The Miller Rubber Company.

Upon this point we respectfully refer the court to the fourth point, and to the argument thereunder, which shows that the business was transacted between The Miller Rubber Company and the bankrupt.

IX.

That said District Court erred in its finding, decision and judgment, under the evidence, that The Miller Rubber Company, the petitioner herein, obtained and had a preference from said bankrupt in the alleged sum of two hundred sixty-nine and ninety eight hundredths ($269.98) dollars, or in any other sum.

Referring the court to the subject matter under consideration, to-wit: the reclamation of goods [pp. 8-16], the question of there having been a preference and the requirement that it should be returned [p. 88] was wholly beyond the jurisdiction of the Special Master, and was not within the issues. This is referred to [p. 40] upon the question of the accounts between the parties, and counsel for the trustee stated: "We are

not trying that now." Objection was made to this in the report of the Audit Company [pp. 40, 120, 125, 129]. The exception on page 129 clearly stated the point as appears of record. See also transcript, pages 114, 120. The question of whether there was, or was not, a preference, would come before the court under section 57 of the Bankrupt Act; and the proceedings in court to determine that question would arise under section 25 of the Bankrupt Act, whereas the proceedings herein arose under section 24—a wholly separate and distinct subject matter and proceeding.

X.

The said District Court erred, under the evidence, in its finding, decision and judgment, that no consent was given to the said bankrupt to make application of commissions that might be due to him (ostensibly from The Miller Rubber Company of California) from The Miller Rubber Company, as against the amount owing by him on open account or notes to The Miller Rubber Company of California or The Miller Rubber Company.

The Special Master's report [p. 78] shows how this question arises, and held that The Miller Rubber Company does not have the right to apply on the indebtedness of Newerf to The Miller Rubber Company, commissions falling due after November 16th, 1914, upon the ground that the application, if any, was made without the bankrupt's consent [see pp. 54, 55]. We especially call the court's attention to the day letter from the bankrupt to The Miller Rubber Company, of November 12th, 1914 [p. 32]:

"Day Letter.

Los Angeles, 11-12-14.

The Miller Rubber Company,
Akron, Ohio.

New notes mailed per your request. Agreeable to apply our commissions on open account. Return to us all notes for which we have sent renewals. Writing.

W. D. Newerf Rubber Co."

This letter did not indicate that the commissions alleged to be due from The Miller Rubber Company of California to the bankrupt were to be applied upon the open account between The Miller Rubber Company and the bankrupt, to November 16th, 1914, only. It further indicates that new notes were mailed showing an extension of time given to the bankrupt upon notes [pp. 54 and 55]. It contemplates, aside from the question of law, the *contractual right* of The Miller Rubber Company to apply said commissions on the amount due to The Miller Rubber Company from the bankrupt. So, too, upon the question of law, The Miller Rubber Company would have the right to apply upon its claim against the bankrupt, any commissions due to the bankrupt from The Miller Rubber Company of California.

Keeping in mind the facts stated in our *fourth* point, and the ultimate fact, to-wit: that The Miller Rubber Company of California at all times was, and is, the agent of The Miller Rubber Company, it is clear that any money ostensibly due from The Miller Rubber Company of California to the bankrupt is properly credited by The Miller Rubber Company upon the amount due to The Miller Rubber Company from the bankrupt. If that conclusion were not true, The Miller

Rubber Company would be placed in the anomalous position of being bound by the acts of its agent as to any obligations which might accrue *against* it to the bankrupt; but at the same time not protected in any rights accruing to *it* from the same contract.

XI.

The said District Court erred in not allowing the depositions of the petitioners in relation to all matters in controversy between The Miller Rubber Company and the bankrupt to be read in evidence.

Upon this point we refer the court to the transcript as follows: Pages 108-123, 144-156. The depositions as shown in the transcript at the foregoing pages, will establish the right of The Miller Rubber Company to all of the property in dispute, and *will also establish its proof of* CLAIM in the bankruptcy proceedings, which has been suspended pending this appeal. The depositions do further establish the right of mutual set-off [pp. 117, 153], and the claim of The Miller Rubber Company [pp. 119, 145-153]. The question of the *amount* of the claim of The Miller Rubber Company, in the bankruptcy proceedings, was not within the jurisdiction of the Special Master, and not within the issues. We urge that the Special Master erred in refusing to allow the depositions to be read into evidence, and that the District Court erred upon the same ground; and that said depositions should be received in evidence to establish the right and title of the Miller Rubber Company to the goods claimed, and also for the purpose of ultimately proving claim in the bankruptcy proceedings.

XII.

The said District Court erred, under the evidence and the law, in its finding, decision and judgment denying the petition for reclamation, and in affirming the order theretofore made by the Special Master denying said petition.

The order and decree against appellants should be reversed upon the following grounds:

1. Because the title to all property claimed in this proceeding at all times was, and is, vested in The Miller Rubber Company under the contract of 1911.

2. That there was no fraud in said contract, and no course of dealing had grown up to make said contract fraudulent as to the creditors of the bankrupt.

3. That the contract of 1914 between the duly authorized agent of The Miller Rubber Company, to-wit: The Miller Rubber Company of California, and the bankrupt, annulled and superseded the contract of 1911.

4. That all property claimed by appellants herein, was held by bankrupt under the 1914 contract, and belongs to The Miller Rubber Company.

5. That in all of these matters and things the Special Master and the District Court erred, and the order and decree should be reversed.

Respectfully submitted,

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Attorneys for Appellants.

BRIEF OF APPELLEE.

Because this case was set for an early date, to-wit: March 17th, and as we may not have time, under the rules of the court, to file an answer brief in the appeal of the trustee herein, we submit an argument upon the questions at issue, determined adversely to the trustee in bankruptcy upon its appeal herein [p. 168], from the order and decree of the District Court reversing the Special Master, ordering the payment by The Miller Rubber Company of California to the trustee in bankruptcy of $4495.25.

The order of the court approved the Special Master's report, except as to the commissions, in which it was disallowed [pp. 132, 133]. In a conversation between the court, counsel for trustee and The Miller Rubber Company, the court stated that his intention was to reverse the Special Master upon this order of $4495.25 against The Miller Rubber Company of California, and upon that understanding the appeal was prosecuted by the trustee in bankruptcy [p. 168].

This controversy arises over the true construction to be placed upon the commissions allowed to the bankrupt under the contract of 1914 [p. 98].

The Special Master goes into this question [pp. 83-86], and finds "the sale was actually at the *list price* without deducting the 5% for cash, and that his commissions should be figured on the discounts allowed of 10-12½-12½-5% from *list* prices [p. 84]. Upon this basis there is a difference between the bankrupt and The Miller Rubber Company of $4495.25."

It is the contention of The Miller Rubber Company that the commission due to the bankrupt is "the dif-

ference between the prices at which goods are *actually* sold * * * and the price of 10-12½-12½-5% from The Miller Rubber Company's 1914 *list price* [p. 98]; and that the price at which the goods are actually sold is the amount of *money received* by the bankrupt for an invoice, less the discounts legally and actually allowed. "The actual selling price is $100.00 less the 5%, so that it is $95.00 that is used as the *actual* selling price instead of $100.00" [p. 35].

The bankrupt complied with this manner of computing the commissions, by his remittance of September 14th, 1914 [p. 53]. There is no dispute in the figures of The Miller Rubber Company showing the amount of commissions for July, 1914 [see Night Letter, p. 54], unless it would be the letter of the bankrupt of October 15th, 1914 [pp. 58, 59].

The finding of the Special Master was excepted to by The Miller Rubber Company [pp. 126, 127]. The depositions show how the commissions were computed [bottom p. 145, 146, 152].

The contract of 1914 itself furnishes the rule to determine this question, and the District Court rightly interpreted it. If the parties had meant that the commissions of the bankrupt should be the difference between the *list* price and 10-12½-12½-5%, they would have employed language showing that was their intention; and in that case the contract would have read that the bankrupt's commission is to be the difference between the *list price* of The Miller Rubber Company and 10-12½-12½-5%, but we do urge, that the language employed intends that the commission is to be the difference between the amount of money received

for the goods and 10-12½-12½-5% from the *price list.* The ultimate result is the difference of 5% on the *business done for cash,* and from *all* the evidence the District Court must have so found, and amounts to $4495.25. Upon this point the District Court correctly construed the contract, and its decree should be affirmed.

CONCLUSIONS.

Upon the reversal of the order and decree, we suggest that the following:

1. That the contract of 1914 between the parties annulled and abrogated the contract of 1911;

2. That all property on hand at the time the contract of 1914 went into effect was possessed and held by the bankrupt under said contract;

3. That the petition herein was properly filed by The Miller Rubber Company to recover the property as being held by the bankrupt under the 1914 contract.

4. That the property on hand be ordered delivered to The Miller Rubber Company.

5. That the District Court be reversed as to the alleged preference of $269.98, upon the ground that it had no jurisdiction of the subject matter, and that the question was not within the issues.

6. That the order of the Special Master, and the affirmance thereof by the District Court as to the amount of the claim of The Miller Rubber Company, and The Miller Rubber Company of California, or either of them, in the bankruptcy proceedings, be reversed, upon the ground that the questions relating thereto are not in issue herein.

7. That the District Court be reversed in its approval of the report of the Special Master as to the legal entity of the two corporations, to-wit: The Miller Rubber Company and The Miller Rubber Company of California, and directed that the real parties in interest, and between whom the controversy must be determined, are: The Miller Rubber Company and the trustee in bankruptcy of W. D. Newerf.

8. As a corollary to the last mentioned suggestion, that as to all business between The Miller Rubber Company of California, and the bankrupt, the right of set-off existed in favor of The Miller Rubber Company.

9. That in all events, the bankruptcy proceedings would, and did, terminate the contract of 1911.

10. That the depositions be read in evidence to properly assist the court in determining the further issues between the parties herein.

Respectfully submitted,

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